Leasing Corporation Sdn Bhd v Indah Lestari Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–02–982 OF 2005
MOKHTAR SIDIN, ZULKEFLI AND SURIYADI JJCA
18 SEPTEMBER 2007

Civil Procedure — Appeal — Adducing fresh evidence — Leave of appellate court to admit fresh evidence — Documents not made available to defendant at material time — Sole deponent to plaintiff's affidavits an undisharged bankrupt — Courts of Judicature Act 1964 s 69(1)

Evidence — Affidavit — Affidavit evidence — Fresh evidence — Sole deponent to plaintiff's affidavits an undisharged bankrupt — Whether failure to disclose indicated lack of bone fide — Whether affidavits filed in support of plaintiff's application for injunction ought to be struck out

This was an appeal by the defendant against the decision of the high court at Kuala Lumpur which allowed the plaintiff's application for an injunction against the defendant preventing them, or any of their agents from selling, disposing or transferring the 452,000 Ayer Molek Rubber Company Berhad shares ('AMR shares') that were lodged with the defendant as a collateral security for the loans given by the defendant to the plaintiff pursuant to several loan agreements entered into between the parties. The defendant had also filed an application by way of notice of motion ('encl 18a') seeking leave to admit and consider in the appeal the new evidence. The defendant contended that the documents were not made available to the defendant at the material time and reasonable diligence would not have made it so available because the defendant was misled into believing that a person by the name of Ismail bin Ahmad ('Ismail') from the plaintiff's company was not an undischarged bankrupt. Ismail was the sole deponent to the plaintiff's affidavits filed in support of the plaintiff's application for the injunction against the defendant. Ismail in his affidavits filed claimed that he was then a corporate advisor, a former director and a shareholder of the plaintiff and was given authority to act for the plaintiff. The defendant only got to know of Ismail's bankrupt status in early May 2007 when it conducted a bankruptcy search with the insolvency department on 9 May 2007.

Held, allowing the appeal:

(1) The plaintiff was legally bound to make a full and frank disclosure of all material facts since in an application for an injunction it must be made with utmost good faith or uberrimae fidei (see the case of *Ooi Bee Tat Development Sdn Bhd v Ooi Bee Tat* [1985] 1 CLJ 449). However, in this case Ismail never made any disclosure as to his status in the affidavits he affirmed for and on behalf of the plaintiff (see para 3).

(2) Neither the plaintiff nor the plaintiff's solicitors informed this fact to the defendant or its solicitors at any point in time. There was also nothing from the pleadings, affidavits and exhibits filed by the plaintiff to even remotely suggest that Ismail was an undischarged bankrupt. Furthermore the defendant contended that there did not appear to be any action taken against Ismail either by the Companies Commission of Malaysia or Insolvency Department which reinforced the defendant's belief at that particular time that there was nothing unusual with regard to Ismail's legal status (see para 3).

(3) In the court's view, the defendant had fulfilled the first condition of its entitlement to bring in new evidence at the hearing of the appeal. This was because even though the said evidence would have been available at the material time, reasonable diligence would not have made it so available. At that point of time the defendant could not know or appreciate its relevance due to the plaintiff and/or Ismail misleading the defendant into believing that he was not an undischarged bankrupt (see para 4).

(4) The new evidence sought to be admitted by the defendant would have had or would have been likely to have had a determining influence upon the decision of the high court. The non-disclosure of Ismail's bankruptcy would reflect on his trustworthiness and the credibility of his evidence in the affidavits he affirmed for and on behalf of the plaintiff. As a bankrupt Ismail was by law required to disclose this material fact. His failure to do so indicated a lack of bone fide both on his and the plaintiff's part. This was especially more important as the plaintiff was applying for an injunction where full and frank disclosure was required and parties applying for such a remedy were to come to court with clean hands (see para 5).

[Bahasa Malaysia summary

Ini adalah rayuan defendan terhadap keputusan Mahkamah Tinggi di Kuala Lumpur yang membenarkan permohonan plaintif untuk satu injunksi terhadap defendan menghalang mereka, atau mana-mana ejen-ejen mereka daripada menjual, melupuskan atau memindahkan 452,000 saham-saham Ayer Molek Rubber Company Berhad ('saham-saham AMR') yang disimpan oleh defendan sebagai jaminan kolateral untuk pinjaman-pinjaman yang diberikan oleh defendan kepada plaintif mengikut beberapa perjanjian pinjaman di antara kedua-dua pihak. Defendan juga telah memfailkan satu permohonan melalui notis usul ('kandungan 18a') memohon kebenaran untuk mengemukakan dan menimbangkan di rayuan ini keterangan baru. Defendan menyatakan bahawa dokumen-dokumen tidak disediakan kepada defendan pada masa yang material dan ketekunan yang munasabah juga tidak akan dapat mengemukakannya oleh kerana defendan telah diperdayakan dalam mempercayai bahawa seorang yang bernama Ismail bin Ahmad ('Ismail') daripada syarikat plaintif bukanlah seorang bankrap yang belum dilepaskan. Ismail adalah deponen tunggal kepada afidavit-afidavit plaintif yang difailkan untuk menyokong permohonan plaintif untuk satu injunksi terhadap defendan. Ismail di dalam afidavit yang difailkan menyatakan bahawa beliau adalah pada ketika itu seorang penasihat korporat, seorang bekas pengarah dan seorang pemegang saham plaintif dan diberi kebenaran untuk bertindak bagi pihak plaintif.

Defendan hanya ketahui status kebankrapan Ismail pada awal Mei 2007 apabila ia menjalankan satu carian kebankrapan di pejabat insolvensi pada 9 Mei 2007. A

Diputuskan, membenarkan rayuan tersebut: B

(1) Plaintif dikehendaki di sisi undang-undang untuk membuat pendedahan yang penuh dan terus-terang kesemua fakta-fakta yang material oleh kerana untuk satu permohonan injunksi niat mulia harus diamalkan atau uberrimae fidei (lihat kes *Ooi Bee Tat Development Sdn Bhd v Ooi Bee Tat* [1985] 1 CLJ 449). Akan tetapi, dalam kes ini Ismail tidak pernah mendedahkan statusnya di dalam afidavit-afidavit yang disahkan untuk dan bagi pihak plaintif (lihat perenggan 3). C

(2) Fakta ini tidak didedahkan oleh plaintif mahupun peguamcara plaintif kepada defendan ataupun peguamcara defendan pada bila-bila masa. Tidak juga terdapat apa-apa daripada pliding, afidavit, dan ekshibit yang difailkan oleh plaintif untuk mencadangkan sedikit pun Ismail adalah seorang bankrap yang belum dilepaskan. Selanjutnya juga defendan menyatakan bahawa tiada apa-apa tindakan yang diambil terhadap Ismail sama ada oleh Suruhanjaya Syarikat Malaysia ataupun Jabatan Insolvensi yang mengukuhkan kepercayaan defendan pada masa tersebut langsung tiada apa-apa yang pelik berhubungan dengan status undang-undang Ismail (lihat perenggan 3). D E

(3) Pada pandangan mahkamah, defendan telah memenuhi syarat pertama haknya untuk mengemukakan keterangan baru pada pendengaran rayuan. Ini adalah kerana walaupun keterangan tersebut wujud pada masa yang material, ketekunan yang munasabah tidak dapat mendedahkannya. Pada masa tersebut defendan tidak tahu ataupun tidak memahami keperluannya oleh kerana plaintif dan/atau Ismail telah memperdayakan defendan dalam mempercayai bahawa beliau bukanlah seorang bankrap yang belum dilepaskan (lihat perenggan 4). F

(4) Keterangan baru yang dipohon untuk dikemukakan oleh defendan akan dapat atau berkemungkinan akan mempengaruhi keputusan Mahkamah Tinggi. Ketakdedahan kebankrapan Ismail akan mencerminkan kebolehpercayaan keterangannya di dalam afidavit-afidavitnya yang disahkan untuk dan bagi pihak plaintif. Sebagai seorang bankrap, Ismail perlu mengikut undang-undang untuk mendedahkan fakta material ini. Kegagalannya berbuat demikian menunjukkan kekurangan bona fide pada pihaknya dan juga pada pihak plaintif. Ini adalah lebih penting lagi oleh kerana plaintif memohon untuk satu injunksi di mana pendedahan yang penuh dan terus-terang adalah perlu dan pihak-pihak yang memohon remedi sedemikian harus ke mahkamah dengan hati yang suci (lihat perenggan 5).] G H

Notes I

For cases on adducing fesh evidence, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 637–662.

For cases on affidavit evidence, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 241–247.

Cases referred to

Asia Commercial Finance (M) Bhd v Pasadena Properties Development Sdn Bhd [1991] 1 MLJ 111 (refd)

Ooi Bee Tat Development Sdn Bhd v Ooi Bee Tat [1985] 1 CLJ 449 (refd)

Legislation referred to

Companies Act 1965 s 125(1)
Court of Judicature Act 1964 s 69
Rules of Court of Appeal 1994 r 7(3A)

Appeal from: Civil Suit No S1–22–680 of 2005 (High Court, Kuala Lumpur)

Fahri Azzat (Izzat Othman and Audrey Quah with him) (Azzat & Izzat) for the appellant.

CK Yeoh (Sarjeet Sidhu with him) (Sidhu & Associates) for the respondent.

Zulkefli JCA (delivering judgment of the court):

[1] This is an appeal by the defendant against the decision of the High Court at Kuala Lumpur which allowed the plaintiffs application for an injunction against the defendant preventing them, or any of their agents from selling, disposing or transferring the 452,000 Ayer Molek Rubber Company Berhad shares ('AMR shares') that were lodged with the defendant as a collateral security for the loans given by the defendant to the plaintiff pursuant to several loan agreements entered into between the parties.

[2] Before we proceed to hear the appeal we shall first deal with the defendant's application filed by way of Notice of Motion ('encl 18a')seeking leave of this court to admit and consider in the appeal the new evidence as contained in exhs 'JY-1', 'JY-2', 'JY-3', 'JY-4', 'JY-5' and 'JY-7' ('the said exhibits']. Under the provisions of s 69 of the Court of Judicature Act 1964 and r 7(3A) of the Rules of Court of Appeal 1994, new or fresh evidence may be admitted during the hearing of the appeal provided two conditions are fulfilled which are as follows:

(a) at the hearing before the High Court the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and

(b) the new evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the High Court.

[3] It is the contention of the defendant that the documents in exhs 'JY-1', 'JY-2', 'JY-3', 'JY-4', 'JY-5' and 'JY-7' were not made available to the defendant at the material time and reasonable diligence would not have made it so available because the defendant was misled into believing that a person by the name of Ismail bin Ahmad ('Ismail') from the plaintiffs company was not an undischarged bankrupt. Ismail was the sole deponent to the plaintiffs affidavits filed in support of the plaintiffs application for the injunction against the defendant. Ismail in his affidavits

filed claimed that he was then a corporate advisor, a former director and a shareholder of the plaintiff and was given authority to act for the plaintiff. We agree with the contention of the defendant that Ismail being an undischarged bankrupt since 4 March 2002 must at the time of affirming an affidavit disclose his incapacity with regard to his status as an undischarged bankrupt to the attention of the court. The plaintiff is legally bound to make a full and frank disclosure of all material facts since in an application for an injunction it must be made with utmost good faith or uberrimae fidei (see the case of *Qoi Bee Tat Development Sdn Bhd v Ooi Bee Tat* [1985] 1 CLJ 449). However, in this case Ismail never made any disclosure as to his status in the affidavits he affirmed for and on behalf of the plaintiff. Neither the plaintiff nor the plaintiffs solicitors informed this fact to the defendant or its solicitors at any point in time. There is also nothing from the pleadings, affidavits and exhibits filed by the plaintiff to even remotely suggest that Ismail was an undischarged bankrupt. Furthermore the defendant contended that there did not appear to be any action taken against Ismail either by the Companies Commission of Malaysia or Insolvency Department which reinforced the defendant's belief at that particular time that there was nothing unusual with regard to Ismail's legal status.

[4] The defendant only got to know of Ismail's bankrupt status in early May 2007 when it conducted a bankruptcy search with the Insolvency Department on 9 May 2007. It is our view that the defendant has fulfilled the first condition of its entitlement to bring in new evidence at the hearing of the appeal. This is because even though the said evidence would have been available at the material time, reasonable diligence would not have made it so available. At that point of time the defendant could not know or appreciate its relevance due to the plaintiff and/or Ismail misleading the defendant into believing that he was not an undischarged bankrupt.

[5] We also find that the new evidence sought to be admitted by the defendant would have had or would have been likely to have had a determining influence upon the decision of the High Court. Exhibit 'JY-l' is a document issued by the Insolvency Department of Malaysia. This would prove that Ismail was a bankrupt and his non-disclosure of this fact would reflect on his trustworthiness and the credibility of his evidence in the affidavits he affirmed for and on behalf of the plaintiff. As a bankrupt Ismail was by law required to disclose this material fact. His failure to do so indicates a lack of bone fide both on his and the plaintiff's part. This is especially more important as the plaintiff was applying for an injunction where full and frank disclosure is required and parties applying for such a remedy are to come to court with clean hands. Furthermore s 125(1) Companies Act 1965 provides that a person who is an undischarged bankrupt and acts as director of a company shall be guilty of an offence. At the material time therefore Ismail was in breach of this provision and faced a penalty of imprisonment for five years or a fine of RM100,000 or both.

[6] As a bankrupt Ismail had no capacity to affirm an affidavit on behalf of the plaintiff and his averment pertaining to the plaintiff is inadmissible and cannot be relied upon (see the case of *Asia Commercial Finance (M) Bhd vPasadena Properties Development Sdn Bhd* [1991] 1 MLJ 1111). As a result of this, we are of the view the

affidavits affirmed by the plaintiff in the High Court are invalid and should have been disregarded at the hearing in the High Court.

[7] Exhibit 'JY-2' is a company search on Ayer Molek Rubber Company Berhad. Exhibits 'JY-3' and 'JY-4' are its Annual Reports for the years 2002 and 2005 respectively. All these three Exhibits showed Ismail acting as a director of the Company and these documents prove that Ismail was in flagrant breach of s 125(1) Companies Act 1965. Being an undischarged bankrupt, Ismail cannot be acting as a director of Ayer Molek Rubber Company Berhad. Exhibit 'JY-5' comprises of two letters both dated 10 May 2007 sent by the defendant's solicitors notifying the Companies Commission of Malaysia and the Insolvency Department, Malaysia respectively of Ismail's activities despite his bankrupt status. These letters could not have been with reasonable diligence produced and submitted to the court earlier since these letters could only be written by the defendant after the defendant discovered Ismail's status as a bankrupt on 9 May 2007.

[8] Exhibit 'JY-7' is the announcement under the Listing Circular No L/Q 43752 of 2007 by Ayer Molek Rubber Company Berhad to Bursa Malaysia Securities Berhad ('Bursa Securities') dated 1 June 2007 announcing its imminent delisting from the Official List of Bursa Securities. The significance of the inclusion of this announcement to Bursa Securities is to show the fact that at the High Court in the application for the injunction Ismail had deposed in his affidavit that the plaintiff had a good reputation and that if the defendant were allowed to sell the 452,000 AMR shares that it held as security for the loan given to the plaintiff, then it would give a negative impression of the plaintiff and would ruin its reputation in the commercial world. Ismail had also further deposed that to sell those AMR shares would also cause the price to fall because it was such a large block. This announcement to Bursa Securities is evidence of a subsequent event that took place which showed Ismail's belief at the time he deposed the content of his affidavit supporting the application for the injunction to be completely without basis. It is our view if the true factual circumstances were made available to the learned Judge of the High Court it is likely that the learned Judge may have come to a different conclusion as the value of the security of the AMR shares had fallen considerably from a value of about RM20 per share to not being traded on the Bursa Securities at all. The defendant cannot now realize its security and has therefore been prejudiced greatly by the said injunction obtained by the plaintiff.

[9] For the above stated reasons we allowed the defendant's application in encl (18a) and made an order in terms of the defendant's application.

[10] Having allowed the defendant's application in encl (18a) learned counsel for the defendant applied to us to strike out the affidavits of Ismail filed in support of the plaintiffs application for the injunction on the ground that the affidavits are defective and invalid and should have been disregarded at the hearing before the High Court. We accordingly struck out the said affidavits. The fact remains that the affidavits of the plaintiff were deposed by the sole deponent, Ismail and it would become apparent now that the plaintiff has no more legal basis to support its application for the injunction against the defendant. We have no other alternative but

to allow the defendant's appeal. The injunctive orders granted by the learned judge of the High Court are hereby set aside. We also make an order of a sum of RM2,000 to be paid by the plaintiff to the defendant as costs of the proceedings in this appeal and the deposits to be refunded to the defendant.

Appeal allowed.

Reported by Sally Kee